

November 19, 2014 Fairness Hearing Demonstrative Slides Presented By Counsel for the Morey Objectors

In re NFL Concussion Injury Litigation,
No. 2:12-md-2323 (E.D. Pa.)

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

No. 2:12-md-02323-AB
MDL No. 2323

Kevin Turner and Shawn Wooden,
*on behalf of themselves and
others similarly situated,*

Civil Action No. 2:14-cv-00029-AB

Plaintiffs,

v.

National Football League et al.

Defendants.

Objections to Class Action Settlement

Denial of Final Approval Is Appropriate Where:

“[T]he settlement treats ‘similarly situated class members differently’”

OR

“[T]he settlement releases ‘claims of parties who received no compensation in the settlement’”

Ehrheart v. Verizon Wireless, 609 F.3d 590, 604 (3d Cir. 2010)
(quoting Manual for Complex Litigation, Fourth, § 21.61)

Class Action Settlement Agreement

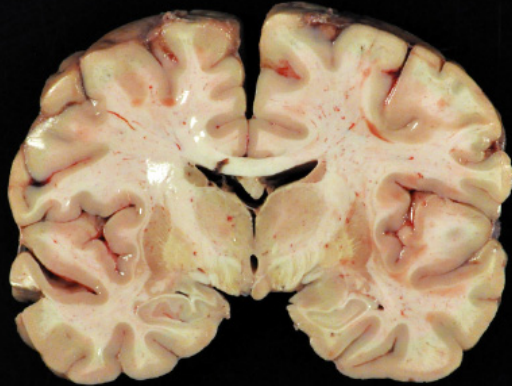
Section 18.1 Releases

(a) ...

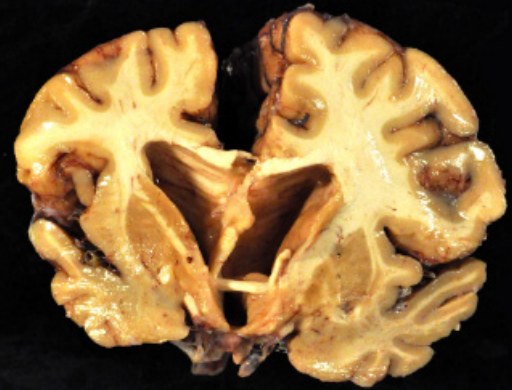
hereby
waive and release, forever discharge and hold harmless the Released Parties, and each of them, of and from any and all past, present and future claims ...

(ii) arising out of, or relating to, head, brain and/or cognitive injury, as well as any injuries arising out of, or relating to, concussions and/or subconcussive events ...

(iv) arising out of, or relating to, CTE; and/or



Healthy Brain



Brain Diseased
With CTE

What is CTE?

Progressive degenerative brain disease

In people who suffered repetitive brain trauma (concussive and sub-concussive)

Objectors' Experts

Dr. Gandy Decl. ¶ 4

Agreed

Dr. Hovda (Class Cnsl.) Decl. ¶ 19

What is CTE?

A brain with CTE shows **tau tangles** in certain locations and patterns

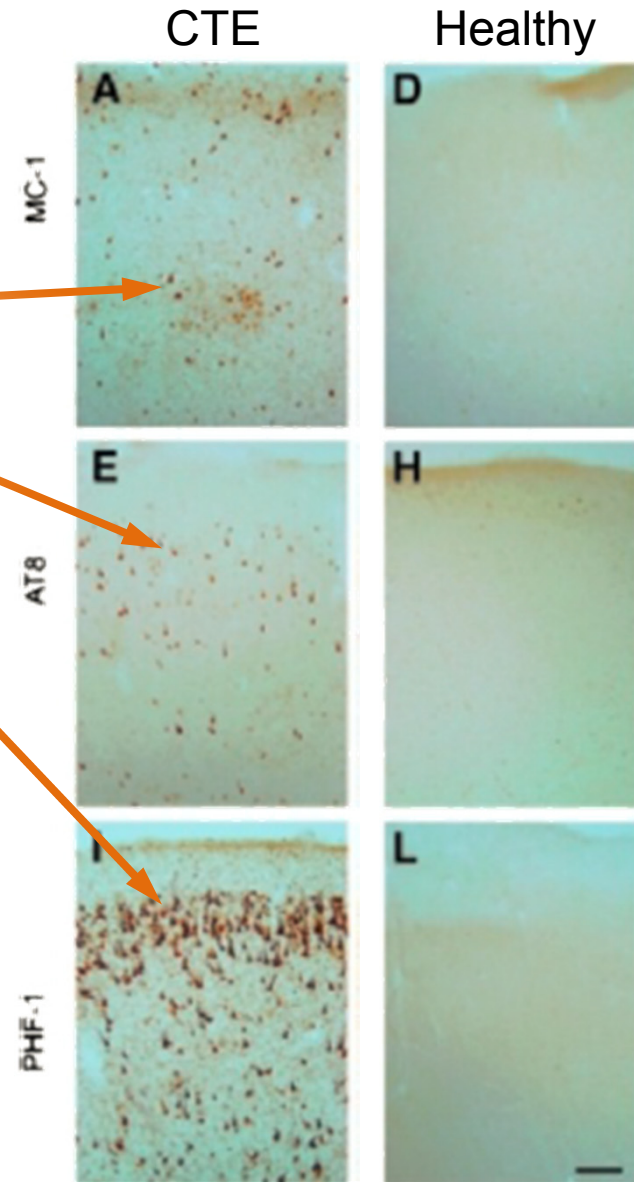
A healthy brain does not

Objectors' Experts

Tau protein builds up in the brain in a specific pattern that is unique to CTE. (Dr. Gandy Decl. ¶¶ 4, 15)

Agreed

Scientists diagnose CTE by “determin[ing] if something called the ‘tau protein’ is present and in a particular pattern....” (Dr. Yaffe (NFL) Decl. ¶ 55)



What is CTE?

In contrast to Alzheimer's, Parkinson's, and ALS, CTE *requires* repetitive head trauma

"The Industrial Disease of Football"

Objectors' Experts

Dr. Gandy Decl. ¶ 4

Agreed

Dr. Hovda (Class Cnsl.) Decl. ¶ 19

What is CTE?

definitive diagnosis - post mortem
(but lack of precision in diagnosing other neurological diseases in the living)

Objectors' Experts

Dr. Stern Decl. ¶ 36

Dr. Gandy Decl. ¶ 15

Agreed

Dr. Schneider (NFL) Decl. ¶¶ 22, 42

What is CTE?

Within the next five to ten years, there will be highly accurate, clinically accepted methods to diagnose CTE during life

Objectors' Experts

Dr. Stern Decl. ¶ 38

Agreed

Dr. Hovda (Class Cnsl.) (quoted in Jane Leavy, *The Woman Who Would Save Football*, Grantland (Aug. 17, 2012), <http://grantland.com/features/neuropathologist-dr-ann-mckee-accused-killing-football-be-sport-only-hope>)

What is CTE?

STAGE I	STAGE II	STAGE III	STAGE IV
Short-term memory difficulties	Short-term memory loss	Memory loss with mild dementia	Severe memory loss with dementia
Executive dysfunction	Executive dysfunction	Executive dysfunction	Executive dysfunction
Loss of attention and concentration	Loss of attention and concentration	Loss of attention and concentration	Profound loss of attention and concentration
Explosivity / aggression	Explosivity / aggression	Explosivity / aggression	Explosivity / aggression
Suicidality	Suicidality	Suicidality	Suicidality
Headaches	Headaches	Headaches	Depression
	Mood swings or depression	Mood swings or depression	Impulsivity
	Impulsivity	Impulsivity	Language difficulties
	Language difficulties	Language difficulties	Visuospatial difficulties
		Visuospatial difficulties	Apathy
		Apathy	Paranoia

Source: McKee et al. 2013 (Nitz Decl. Ex. 5)

NFL Causes CTE: Class Allegation

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FOI

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LEAGUE PLAYERS'
INJURY LITIGATION

Kevin Turner and Sha
on behalf of themselves
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Plaintiffs,

v.

National Football League and
NFL Properties, LLC,
successor-in-interest to
NFL Properties, Inc.,
Defendants.

THIS DOCUMENT RELATES TO:
ALL ACTIONS

The NFL Knew the Dangers and Risks Associated with Repetitive Head Impacts and Concussions

89. For decades, the NFL has been aware that multiple blows to the head can lead to long-term brain injury, including but not limited to memory loss, dementia, depression, and CTE and its related symptoms.

PLAINTIFFS' CLASS ACTION COMPLAINT

NFL Causes CTE: Science



2013 Published Study in BRAIN Journal
34 of **35** deceased professional
players diagnosed with **CTE**

2014 Research Update
76 of **79** deceased NFL
players diagnosed with **CTE**

NFL Causes CTE: Opinion of Class Counsel

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US

Multiple medical studies have found direct correlation between football concussions and suffering from symptoms of chronic traumatic encephalopathy, also known as CTE. CTE is believed to be the most serious and harmful disease that results from NFL and concussions. CTE is a progressive

Up-to-Date Information on NFL Football Concussions

After years of denying the scientific evidence that links repeated football concussions with long-term brain damage, the NFL is currently in the hot seat. A flood of multi-district NFL lawsuits are finally making this powerful organization take notice.

As Plaintiffs' Co-Lead Counsel, we deeply care about this topic—and about keeping the public up-to-date on the latest findings and pursuit of justice. We encourage those of you who would like to simply stay abreast of this volatile topic or those who want helpful information for a possible lawsuit, to bookmark this page.

football
from a
concussion-related disease?

Free Case Evaluation

Recipient of The National Law Journal's
Plaintiffs Hot List

Full Name

Post-July 7, 2014 Award For CTE  **\$0**


Seeger Decl. ¶ 37
NFL Brief p. 78

Compensation for Dementia ≠ Compensation for CTE

Death with CTE
Before July 7, 2014

CTE

Stage 1
Stage 2
Stage 3
Stage 4



\$4 million

Death with CTE
On or After July 7, 2014

CTE

Stage 1
Stage 2



\$0

Stage 3
Stage 4



Claims
Process

– ? – Dementia 1.5 → \$1.5 million
– ? – Dementia 2.0 → \$3 million

INTRACLASS CONFLICT

Denial of Final Approval Is Appropriate Where:

Class representatives fail to “fairly and adequately represent the interests of the class.”

Fed. R. Civ. P. 23(a)(4)

The “linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.”


*Dewey v. Volkswagen
Aktiengesellschaft*, 681 F.3d
170, 183 (3d Cir. 2012)

Representative plaintiffs do not allege:

- ▶ Have or at risk of having CTE
- ▶ Played in NFL Europe
- ▶ Subject to TBI/Stroke Set-Offs

Rights bargained away

Intraclass Conflict: Unequal Compensation for Equal Condition – CTE

Death with CTE (stages I-IV)
before July 7, 2014  \$4 million
(max)

Death with CTE (stages I-IV)
on or after July 7, 2014  **\$0**

Intraclass Conflict: Unequal Compensation for Equal Exposure – NFL Europe

Operated by NFL 1991-1992, 1995-2007

Same rules

Same equipment

Same players



Morey Declaration

Heimburger Declaration

Intraclass Conflict: Unequal Compensation for Equal Exposure – NFL Europe



3+ Games on Active Roster



1 Eligible Season

8+ Games on Developmental Squad



0.5 Eligible Season



10 Game Season



0 Eligible Seasons

Both NFL and NFL Europe players release all claims

Intraclass Conflict: Unequal Compensation for Equal Exposure – NFL Europe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL
FOOTBALL LEAGUE
PLAYERS' CONCUSSION
LITIGATION

Kevin Turner and
others similarly
situated

Plaintiffs,

v.

National Football
League Properties,
successor-in-interest
of NFL Properties,

Defendants.

THIS DOCUMENT
RELATES TO ALL
ACTIONS

16. ... I also asked that counsel explain the rationale underlying the treatment of seasons played by class members in NFL Europe. I believe as well that the parties should consider modifications to the settlement agreement to address the NFL Europe issue.

93. Several objectors complain that the settlement does not include time in NFL Europe in calculating eligible seasons for monetary awards.¹⁴⁰ It is my belief that the parties should consider modifications to the settlement to address this issue.

DECLARATION OF ROBERT H. KLONOFF RELATING TO THE PROPOSED CLASS
SETTLEMENT IN THE NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

Klonoff (Class Cnsl.) Decl.
¶¶ 16, 93

NOTICE

Class Counsel's Notice Statistics Are Misleading

78% of the 65,000 people who visited the website **looked only at the first page**

The average viewer looked for **a minute or less**

Brown Decl. Attachment 7

Short Form Notice

NFL Concussion Settlement
All Valid Claims of Retired NFL Football Players to be Paid in Full for 65 Years
Monetary Awards, Baseline Medical Exams and Other Benefits Provided

The NFL and NFL Properties have agreed to a class action Settlement with retired players who sued, accusing them of failing to warn of and hiding the dangers of brain injury associated with playing football. The Settlement does not establish any wrongdoing on the part of the NFL or NFL Properties.

The Settlement Class generally includes all retired players of the NFL, AFL, World League of American Football, NFL Europe League and NFL Europe.

Who is included in the Settlement?

What does the Settlement provide?

What does the Settlement provide?

The Settlement provides money for three benefits:

- Baseline medical exams to determine if retired players suffer from neurocognitive impairment and are entitled to additional testing and/or treatment (\$75 million),
- Monetary awards for diagnoses of ALS (Lou Gehrig's disease), Alzheimer's Disease, Parkinson's Disease, Dementia and certain cases of chronic traumatic encephalopathy or CTE (a neuropathological finding) diagnosed after death. The maximum monetary awards range from \$1.5 million to \$5 million depending on the diagnosis. All valid claims will be paid in full for 65 years; and
- Education programs and initiatives related to football safety (\$10 million).

Please Share this Notice with Other Players and Their Families
For More Information and to Register for Benefits:
1-855-887-3485 or www.NFLConcussionSettlement.com

Long Form Notice

NFL Concussion Settlement Benefits and Legal Rights

14. WHAT DIAGNOSES QUALIFY FOR MONETARY AWARDS?

Monetary awards are available for the diagnosis of ALS, Parkinson's Disease, Alzheimer's Disease, Level 2 Neurocognitive Impairment (*i.e.*, moderate Dementia), Level 1.5 Neurocognitive Impairment (*i.e.*, early Dementia) or Death with CTE (the "Qualifying Diagnoses"). A Qualifying Diagnosis may occur at any time until the end of the 65-year term of the Monetary Award Fund.



Long Form Notice

NFL Concussion Benefits and Le

QUALIFYING DIAGNOSIS	MAXIMUM AWARD AVAILABLE
Amyotrophic lateral sclerosis (ALS)	\$5 million
Death with CTE (diagnosed after death)	\$4 million
Parkinson's Disease	\$3.5 million
Alzheimer's Disease	\$3.5 million
Level 2 Neurocognitive Impairment (i.e., moderate Dementia)	\$3 million
Level 1.5 Neurocognitive Impairment (i.e., early Dementia)	\$1.5 million

Christopher Seeger Quotes

“CTE is not a relevant marker for anything in this settlement. It’s the symptoms — if you have all the symptoms that are related to CTE, or the diseases that are related, like dementia and Alzheimer’s and ALS, then that determines it. . . . If a player thinks he has any symptoms of it, that’s the very reason to stay in the deal.”

Christopher Seeger quoted in
SportingNews (July 14, 2014)

Class Confusion: Eric Williams' Objection

<p>Case 2:12-md-02323-AB Document 6345 Filed 11/03/14 Page 1 of 5</p> <p>7/3/2014 National Football League Players' Concussion No. 2:12-md-</p>	<p>Age 50 2012: UCLA</p> <ul style="list-style-type: none">Diagnosed with CTE. Subject NFL4
<p>Honorable J</p> <p>My name is 5 years for the and played there, another four years, an injury caused me to retire in 1994.</p> <p>I'm guessing Because, six uniqueness; (UCLA: NFL</p> <p>The reason f NFL, neuroc agreement s questions, no give this prop</p> <p>Medical Hist</p> <p>Before Age 2000:</p> <ul style="list-style-type: none">Diagn <p>2008 NFL</p> <ul style="list-style-type: none">Award disabl	<p>CTE</p> <ul style="list-style-type: none">Players diagnosed with CTE (living) today, have to kill themselves or die for their family to ever benefit.In my case, based upon all my other reports. There is an overwhelming chance, my family have a lifetime of medical bills, including long term care, on its horizon. But the only time the family can get relief is after I'm dead?.
<p>By _____</p>	<p>RECEIVED JUL 2 2014</p>

Proposed Revisions for a Fair and Adequate Settlement

NOTICE

Re-notice class with clear, consistent, and accurate language

NFL EUROPE

Give credit for play

NON-NFL TBI/STROKE OFFSETS

Reduce to a reasonable, evidence-based percentage

CTE

Include compensation for **CTE** for death after July 7, 2014

Include compensation for **CTE** while living once reliable tests are developed

Treat all symptoms of **CTE** – stages I - IV

Or – eliminate **CTE** from the release



Impediments to Fair Recovery

- X** Opt in within 180 days
- X** Baseline Assessment Program test within two years
- X** Claim Package within two years of receiving a qualifying diagnosis
- X** Asymmetric appeals process

The Baseline Assessment Program

Capped at \$75 million

Ends in 10 years, subject to a 5-year extension

Does not compensate CTE

Class Cnsl. Br. (p. 70): "main goal" of BAP to provide baseline assessments, not provide medical treatment

Impediments to Fair Recovery

- X** Opt in within 180 days
- X** Baseline Assessment Program test within two years
- X** Claim Package within two years of receiving a qualifying diagnosis
- X** Asymmetric appeals process

Proposed Revisions for a Fair and Adequate Settlement

Lift the cap on the BAP

Extend the BAP to the full term of the Settlement

Eliminate the opt-in requirement

Make it easier to get a qualifying diagnosis

“Even up” the appeal process



**BASELINE NEUROPSYCHOLOGICAL TEST BATTERY AND SPECIFIC IMPAIRMENT
CRITERIA FOR RETIRED NFL FOOTBALL PLAYERS**

Section 1. Test Battery

Estimating Premorbid Intellectual Ability	Learning and Memory (6 scores)
ACS Test of Premorbid Functioning (TOPF)	WMS-IV Logical Memory I
Complex Attention/Processing Speed (6 scores)	WMS-IV Logical Memory II
WAIS-IV Digit Span	WMS-IV Verbal Paired Associates I
WAIS-IV Arithmetic	WMS-IV Verbal Paired Associates II
WAIS-IV Letter Number Sequencing	WMS-IV Visual Reproduction I
WAIS-IV Coding	WMS-IV Visual Reproduction II
WAIS-IV Symbol Search	Language (3 scores)
WAIS-IV Cancellation	Boston Naming Test
Executive Functioning (4 scores)	Category Fluency (Animal Naming)
Verbal Fluency (FAS)	BDAE Complex Ideational Material
Trails B	Spatial-Perceptual (3 scores)
Booklet Category Test	WAIS-IV Block Design
WAIS-IV Similarities	WAIS-IV Visual Puzzles
Effort/Performance Validity (8 scores)	WAIS-IV Matrix Reasoning
<i>ACS Effort Scores</i>	Mental Health
ACS-WAIS-IV Reliable Digit Span	MMPI-2RF
ACS-WMS-IV Logical Memory Recognition	Mini International Neuropsychiatric Interview
ACS-WMS-IV Verbal Paired Associates Recognition	
ACS-WMS-IV Visual Reproduction Recognition	
ACS-Word Choice	
<i>Additional Effort Tests</i>	
Test of Memory Malingering (TOMM)	
Medical Symptom Validity Test (MSVT)	

Deficiencies with the Test Battery

“The specific tests selected, and the length of the battery would not be consistent with that given by the large majority of neuropsychologists who specialize in neurodegenerative disease ...”

Dr. Stern Decl. ¶ 43

“... the criteria used in the Settlement could require that the [player’s] test performance be even more impaired than what is often seen in well-diagnosed cases of moderate stage dementia.”

Dr. Stern Decl. ¶ 50

Proposed Revisions for a Fair and Adequate Settlement

Adopt appropriate testing procedures that accurately reflect the extent of injury

Ability to revise test battery as experience using it builds

Use existing NFL tests of player IQ prior to joining NFL

